Case No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

WAYNE CHUNG

Petitioner.

v.

The Superior Court of the City

and County of San Francisco,

Respondent

THE MEDICAL BOARD OF CALIFORNIA

Real Party in Interest

On Petition For Writ Of Certiorari
To The San Francisco Superior Court
Case No: CPF 08-508852

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Medical Board of California violated the First Amendment of the United States Constitution's guarantee of free speech by disciplining a physician based solely on his writing complaint letters to a federal agency.

2. Whether the Medical Board of California violated the Fourteenth Amendment of the United States Constitution's guarantee of equal protection of the laws, by using fraud and perjury to deprive a physician his right to due process and property.

PARTIES TO THE PROCEEDINGS

Petitioner, Wayne Chung, MD, is a party to the action maintained in the administrative writ filed in Respondent Superior Court entitled *Wayne Chung vs. Medical Board*, San Francisco Superior Court No. CPF-08-508852.

Respondent is the Superior Court of the State of California, for the County of San Francisco. Real Party of Interest, Medical Board of California, is an agency of the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wayne Chung, MD respectfully requests for a Writ of Certiorari to review the judgment of the San Francisco Superior Court in this case.

OPINIONS BELOW

The judgment of the San Francisco Superior Court is unpublished.

JURISDICTION

The judgment of the San Francisco Superior Court was entered on Dec. 18, 2008. On Jan. 15, 2009, Petitioner filed a Petition for Writ of Mandate and Stay in the California Court of Appeals, First Appellate District. On Jan. 22, 2009, the Petition and Stay were denied by summary order. On Jan. 28, 2009, Petitioner filed a Petition for Review in the California Supreme Court. On March 18, 2009, the Petition was denied by summary order. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the United States Constitution states, "Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. LEGAL FRAMEWORK

The United States Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas v. Johnson* (1989) 491 U.S. 397, 414; see also *Street v. New York* (1969) 394 U.S. 576, 592.) "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.

The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) "Under the First Amendment there is no such thing as a misleading idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340.) Thus, speech criticizing the government and governmental officials receives the highest protection under

both the United States and California Constitutions, Cal. Const. Art. I, § 2(a), U.S. Const. Amend. I.

This Petition For Writ of Certiorari presents an unprecedented situation in which a highly qualified and competent physician faces lengthy and severe discipline for having complained as a private U.S. citizen to a government agency. Although no patient or peer has ever registered a complaint of any kind regarding Petitioner, the Medical Board of California ("MBC") targeted him for investigation, forced psychiatric examination, emergency suspension, and public discipline.

This sequence of events was precipitated by the Petitioner having written complaint letters to the United States Department of Justice ("DOJ") in 2005 and 2007. He merely asked for an investigation of suspected privacy violations and electronic surveillance conducted against him based on circumstantial evidence. In 2005, a representative of the Department of Justice, Ken Gibson purportedly sent an irregular fax to the MBC (but not released to Petitioner until 2008) alleging that Petitioner suffered from "severe mental illness" based solely on his writing of such a complaint letter. This unqualified medical "diagnosis" has continued to preoccupy the MBC ever since. An investigation of Petitioner's practice lasting nearly three years has uncovered absolutely no patient harm or breach in the standard of care. He has, however, been repeatedly forced to justify the legitimacy of his complaint letters, all without any investigation into his allegations even attempted.

The MBC never carried out its obligation to truly investigate the circumstances underlying Petitioner's complaint letters and simply assumed that all of the allegations were untrue. The Courts have previously ruled that it is the responsibility of the MBC to establish reasonable certainty by investigating the test results first, before discipline could be imposed. In *Medical Board v.*

Superior Court (2003) 111 Cal. App. 4th at 178 the MBC failed to investigate first, and as a result, the Board's disciplinary action against the physician was struck down by the Court.

In Petitioner's case, the MBC failed to establish reasonable certainty regarding grounds for discipline in failing to first investigate Petitioner's complaint letters, before declaring them untrue on its face. Administrative Law Judge Steven Owyang acknowledges in his opinion that the U.S. government has been known to surreptitiously conduct surveillance on its private citizens. (Book 8, 58:fn 2.) [1] Again, the burden of proof is on the MBC to investigate first if they intend to take disciplinary action against Petitioner solely on the basis of his DOJ complaint letters.

Petitioner asked for an investigation based on circumstantial evidence, but the MBC would not investigate. (Book 1, 121:16-18.) The claims made by Petitioner are not the type a private citizen or private investigator would have the technical capability to investigate thoroughly. Rather, a government agency's powers are required to truly determine one way or another whether allegations in the DOJ complaint letters are true. Recent lawsuits brought by the ACLU on behalf of lawyers, academics and journalists regarding accusations of illegal government surveillance also relied upon circumstantial evidence.

The US DOJ Inspector General, Glenn Fine issued a report to Congress in February 2007 that documented multiple abuses of the Patriot Act by law enforcement officials across the country during the time period described by Petitioner in his DOJ complaint letters. A recent

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[1] Books 1-7 were originally submitted as exhibits for the San Francisco Superior Court in the Nov. 13, 2008 writ proceeding. Books 1-8 were submitted as exhibits to California Court of Appeals on Jan. 15, 2009.

whistleblower in the government has come out in December 2008 and publicly stated to national media sources that he witnessed firsthand illegal surveillance of private U.S. citizen's telephone conversations; with the FBI agents often making jokes in the background on sensitive topics such as the U.S. citizens' sexual conversations.

Petitioner's DOJ complaint letters cannot be used as the basis for a false accusation of mental illness by the MBC without a legitimate investigation first by the appropriate government agency to provide the *incontrovertible evidence to the contrary* required by DSM-IV (definitive psychiatric textbook) and Dr. Seaman's own diagnostic criteria for a delusional belief. (Book 4, 109:19-21). Petitioner's claims are in fact, plausible. Since 2005, there have been frequent reports and criticisms of the FBI's surveillance activities over the Internet and the telephone, and the widespread scope of violations of privacy and civil liberties. The Court can certainly take official notice of events in the news regarding surveillance by the government [2].

The due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." It was " ' "intended to secure the individual from the arbitrary exercise of the powers of government." ' " (*Daniels v. Williams* (1986) 474 U.S. 327, 331). Petitioner was deprived of a fair proceeding guaranteed by the due process clause contained in the United States and California

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[2] (See e.g., USA Today, *FBI Stops Using Carnivore Wiretap Software* (Jan.19, 2005); CNN, *Watchdog Says FBI Violated Surveillance Rules* (Oct.25, 2005); UPI, *Judges Deal FBI Surveillance Setback* (Oct.28, 2005); New York Times, *Live Tracking of Mobile Phones Prompts Court Fights on Privacy* (Dec.10, 2005); NPR, *NPR Talk of the Nation: Surveillance Via Cell Phone* (Dec.14, 2005); U.S. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (February, 2007).

Constitutions, the Administrative Adjudication Bill of Rights, Government Code §11425.10 et seq., and Code of Civil Procedure §1094.5(b).

To be consistent with equal protection, persons similarly situated with respect to the legitimate purpose of a law are entitled to receive like treatment. (*Blumenthal v. Board of Medical Examiners* (1962) 57 cal.2d 228.) Petitioner, a healthy licensee, by not being shown reasonable cause for a forced psychiatric exam under Bus. & Prof. Code § 820, was not given the same fairness, and justice in this procedure as other providers had been prior; and therefore was discriminated against and denied equal protection of the laws, U.S. Const. Amend XIV, Cal. Const. Art. I §7. By issuing its emergency interim suspension order on Feb. 5, 2008, and final decision effective Sept. 11, 2008, the MBC has continued depriving Petitioner of his Constitutionally protected due process and property rights. The San Francisco Superior Court erred in concurring with the MBC's decision, denying his petition, and simply ignoring these multiple violations of Petitioner's Constitutional rights.

Deprivation of Petitioner's right to practice was an "emergency" response out of all proportion to the circumstance of Petitioner expressing his right to free speech in writing complaint letters to the DOJ. Under the Due Process Clause, courts have undertaken to protect vested, fundamental rights, particularly the right to practice one's trade or profession from untoward intrusions by government. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) "Unquestionably, a physician has a vested property right in his or her medical license, once acquired." (*Smith v. Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, 326.) Thus, some measure of due process must be given to a professional license holder before license suspension. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640.) An emergency interim suspension order, like an injunction,

is an extraordinary remedy, to be issued with great caution and only in those cases where it appears that the public will suffer irreparable injury if the interim suspension order is not granted. (Gov. Code, § 11529(e) [applying injunction standards to interim suspension orders]; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355 [injunction case].) The MBC made no such showing in this case.

The overwhelming evidence in this matter established that Petitioner is safe to practice and in fact has never caused any patient harm, nor impaired in his ability to practice safely, there was no authority for the MBC to discipline Petitioner under Bus. & Prof. Code § 822, which allows discipline if "the physician suffers from a mental illness that impairs, i.e., lessens or diminishes, his competency to practice safely." The MBC did not produce one *actual* example of any lessening or diminishing of Petitioner's competency to practice safely, yet decided to discipline him, nevertheless, in effect retaliating against and silencing any further attempts to exercise his right to free speech.

Petitioner's complaint letters to the DOJ was an attempt to seek redress for grievances against the government. The MBC has no jurisdiction or legal/moral right to discipline a physician who provides competent medical care and who has been determined to present no danger to patients. There is no statutory authority for what the MBC has done to Petitioner. There is no evidence to support any conclusion that Petitioner poses a risk to the public. The right to criticize the government and governmental officials is among the quintessential rights Americans enjoy under the First Amendment of the United States Constitution, and Californians enjoy under the California Constitution, article I, section 2.

The general public's interest is greatly served by an examination of whether the MBC, as a state governmental

agency, has set a chilling precedence for silencing of protected free speech not only by the Petitioner, but also of other license holders and the public at large. If the MBC's decision is left to stand, any U.S citizen can be retaliated against for writing complaint letters to the government, by simply having the very complaint letters used against him as the basis for a false accusation of mental illness, and subsequent public discipline in order to silence the complaint. Such precedence should not be allowed to stand in the United States of America. Therefore, Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

B. FACTUAL BACKGROUND

Petitioner attended Harvard College, majoring in biochemistry and graduating with honors. (Book 5, 156:15 – 21, 157: 15 – 16) He then graduated from Harvard Medical School. (Book 5, 156:22 – 25, 159:14 – 22). Petitioner received his license to practice medicine in California on November 14, 1997. He became Board certified in internal medicine in November 2003. (Book 5, 167:25 – 168:8). In late October 2004, Petitioner started a private practice in downtown San Francisco, focusing on preventive health care. (Book 5, 168: 8 – 170:25).

While building this practice, Petitioner worked at various California hospitals as a "hospitalist" – providing inpatient medical care on twelve-hour shifts to acutely ill patients. (Book 5, 172:20-175:16). Petitioner has never been the subject of a malpractice claim, has never been subject to discipline in any state, or been the subject of any quality of care peer review proceedings. (Book 5, 184:8 – 25). The MBC has never disclosed the existence of a single quality of care concern raised by anyone at any time in regard to Petitioner!

On June 22, 2005, Petitioner wrote a letter to the Department of Justice expressing his concern that he may have been subjected to unlawful surveillance and invasion of privacy. This was the first time Petitioner had ever written such a letter. (Book 5, 190:18-25). All four *signed* letters were returned to Petitioner by U.S. postal service, addressee unknown. The entire MBC disciplinary proceedings have been based on an *unsigned* copy.

On July 6, 2005, Petitioner received a telephone call from DOJ representative, Ken Gibson who asked him to email him a copy of the complaint letter and a daily log of unusual activity. (Book 2, 10-12; 17-19);(Book 5, 191: 4 – 193:3). Petitioner complied, but had no further contact with Mr. Gibson. (Book 5, 193: 4 – 19). The MBC learned of Petitioner's DOJ correspondence from Mr. Gibson, who opined in irregular faxes on July 7 and 13, 2005 (despite having the complaint letter in his possession less than 24 hours) that Petitioner might have a "severe mental illness." (Book 2, 9;16). In fact, Brian Lee of the DOJ, sent an official letter dated July 11, 2005 to Petitioner stating it was not in his department's jurisdiction to investigate, and there was no mention of mental illness or Mr. Gibson's irregular faxes (Book 3, 181-182).

On October 28, 2005, the Medical Board's Investigator, Craig Stewart, and another investigator, Victor Sandoval arrived at Petitioner's office – unannounced – and informally questioned Petitioner regarding his complaint letter to the DOJ and requested that Petitioner submit to a voluntary psychiatric evaluation. (Book 1, 6:13–22; 31:4–17; 121:9–12.) Mr. Stewart stated there was no formal investigation of Petitioner by the MBC at that time. Petitioner requested Investigator Stewart's assistance in investigating his complaints, to which Investigator Stewart initially agreed. (Book 1, 6:26–27; 31:15–17; 121:12–15.) Petitioner made several requests to Mr. Stewart to investigate Petitioner's

allegations in his DOJ complaint letter. (Book 1, 121:16-17.) Despite Petitioner's numerous requests, Mr. Stewart failed to do anything. (Book 1, 121:18.)

In late October 2006, Petitioner heard again from Mr. Stewart who requested an interview. (Book 1, 121:18-20.) Petitioner agreed to be interviewed on January 10, 2007. However, Mr. Stewart inexplicably failed to appear at this interview. (Book 1, 121:20-24.) MBC investigator Craig Stewart proceeded to conduct an investigation of Petitioner's practice, lasting nearly three years and continuing even after this matter went to hearing. (Book 2, 2-7); (Book 5, 5: 12 – 16; 21: 4 – 22: 14). Despite the lengthy investigation, Mr. Stewart is still not aware of any patient quality of care complaints made by anyone against Petitioner. (Book 5, 24: 9 – 14).

On May 14, 2007, Petitioner sent a second letter to DOJ Inspector General Glenn Fine regarding an investigative report Mr. Fine had authored concerning abuses of the Patriot Act by law enforcement officials. (Book 2, 76). Petitioner reasonably believed that his original DOJ letter had led to a "cascade of events" which he perceived to be potentially retaliatory. At the request of DOJ representatives (Book 3, 183-184), Petitioner detailed those potentially retaliatory events, including the MBC investigation and the loss of some employment opportunities. (Book 3, 63-67); (Book 5, 205 :11 – 208: 4).

On August 13, 2007, Petitioner sent a letter to Ken Gibson (U.S. DOJ) requesting an opportunity to meet with a field agent to discuss his June 22, 2005 complaint letter. (Book 1, 28.) On September 5, 2007, Mr. Gibson (U.S. DOJ) notified MBC investigator Craig Stewart of Petitioner's complaint letters to the DOJ (Book 2, 4). Eleven pages of faxes were sent by Ken Gibson (U.S. DOJ) to MBC investigator Stewart (Book 1, 7:5–7; 31:28–32:4.) Five pages of these DOJ faxes (pp.1,2,9,10,11) have still not been provided to Petitioner as of this date, in clear violation

of Government Code section 11507.6. (Book 1, 115-118; 146-148). Investigator Stewart showed Petitioner's complaint letters to psychiatrist Melvin Brown M.D., who never examined, treated or met with Petitioner, yet nevertheless submitted a declaration on Sept. 30, 2007 in support of a compelled psychiatric examination based solely on his reading of Petitioner's DOJ complaint letters. (Book 2, p. 26-29).

C. PROCEDURAL BACKGROUND

On October 23, 2007, the MBC filed a Petition for Order Compelling Psychiatric Examination. (Book 8, 10-14.) The Petition falsely stated, "There is no fictitious name permit on file for this practice." (Book 8, 11: FN 1.) Petitioner has had at all pertinent times, a valid fictitious name permit on file with the Board. Petitioner was not served or provided with a copy of this Petition prior as per standard procedure accorded to other physicians and required by Bus. & Prof. Code § 2292 (he received it on Feb. 29, 2008, *after* he had already been emergently suspended). Petitioner had no notice it was being considered by the MBC. Petitioner had no prior history of the alleged mental disorder and was not seeing any mental health professional at the time. There was no professional misconduct or quality of care issues raised or violation of the Medical Practice Act, yet the MBC decided to compel Petitioner to see a MBC appointed psychiatrist based solely on his DOJ complaint letters.

On October 31, 2007, the Division of Medical Quality entered an Order Compelling Psychiatric Examination. (Book 8, 15-18). This order was issued without any prior hearing provided to Petitioner as required by Bus. & Prof. Code § 2292. On November 23, 2007, Petitioner submitted to a psychiatric exam conducted by Charles Seaman, M.D (Book 1,122:4-5.) This exam lasted 98 minutes. Dr.

Seaman did not ask one question as to the Petitioner's actual practice of medicine. On December 10, 2007, Dr. Seaman issued his Report to the Medical Board, which opined that Petitioner suffers from a delusional disorder, "persecutory type" that renders him unable to practice medicine safely.

On January 3, 2008, the Medical Board filed a Petition for an Interim Order of Suspension Pursuant to Gov. Code § 11529 (the "IOS Petition"). Relying solely upon Dr. Seaman's Report, the IOS Petition alleged that Petitioner was unable to practice medicine safely due to a mental condition. (Book 8, 26:18-22) On January 28, 2008, Administrative Law Judge Judge Melissa Crowell conducted a hearing on the IOS Petition without taking any live testimony and without requiring that the underlying documents supporting Dr. Seaman's report be produced to Petitioner. (Book 1, 203-225.)

On February 5, 2008, Administrative Law Judge Crowell rendered a Decision ordering that Petitioner's License be suspended on an emergency interim basis pursuant to Gov. Code § 11529. In the Decision, Administrative Law Judge Crowell, without providing any analysis or supporting evidence, leapt to the conclusion that Petitioner's "continued licensure represents a threat of danger to the health, safety or welfare of the people of California." (Book 8, 32: ¶2.)

On Feb 10, 2008, the Medical Board filed its Accusation against Petitioner (the "Accusation"). (Book 8, 35-42.) Many of the 14 source documents (items 2,4,6,10,11) upon which Dr. Seaman rendered his opinion and provided to the Board still were not provided to Petitioner at this time. (Book 1, 93.) On Feb. 29, 2008, MBC investigator Craig Stewart released his investigation report to Petitioner. This report contained the Petition not served to Petitioner prior to his compelled psych. exam. (Book 2, 53-57).

On March 17, 20, April 2, 2008 the full evidentiary hearing with live witnesses was held, presided by Administrative Law Judge Steven Owyang. (Books 4,5,6). Mental health professionals Dr. Charles Seaman, Dr. Robert Dalgoff, Dr. Mark Zaslav all testified. So did Petitioner and his brother Vincent Chung, MD. MBC Investigator Craig Stewart testified.

On April 23, 2008 Administrative Law Judge Owyang issued his Proposed Decision concluding that Petitioner was safe to practice and that the emergency interim suspension order be immediately vacated. He determined that "it was not shown that Respondent (Dr. Chung) has caused patient harm in the past or that he currently presents a danger to his patients." (Book 8, 59: ¶2.)

On May 12, 2008 the MBC issued an Order Maintaining the Interim Suspension Pending Board Decision. (Book 8, 68-69). On May 29, 2008 The MBC issued an Order of Non-Adoption of Proposed Decision; Order Continuing Interim Suspension Order. (Book 8, 71-72). Despite Administrative Law Judge Owyang's opinion, the MBC decided to non-adopt and extend the disciplinary proceedings even further, all the while maintaining the interim suspension order on Petitioner. The MBC was not proceeding at a pace required by law for an interim suspension order where a licensee is entitled to a hearing within 30 days after the accusation is filed and a decision within 15 days after the matter is submitted. (Bus. & Prof. Code, § 125.7 (d); Gov. Code, § 11529, (f).)

On July 24, 2008 the parties appeared before the MBC, Panel A. The MBC members had a chance to hear oral arguments. (Book 7.) One key missing source document (items 6) relied upon by Dr. Seaman in preparing his report still had not been provided to Petitioner despite multiple discovery requests since the beginning of the proceedings. (Book 1, 93.) On Aug. 12, 2008, the MBC

issued its Decision After Non-Adoption effective Sept. 11, 2008. For the most part, the Decision repeated the findings and conclusions of Administrative Law Judge Owyang, but significantly and without justification, *edited out the conclusion that Petitioner did not currently present a danger to his patients.* (Book 8, 102: ¶2.) The Decision After Non-Adoption purports to vacate the interim suspension order, but provides for continuing suspension of Petitioner pending a further psychiatric evaluation to determine whether Petitioner is fit to practice medicine, along with 5 years of onerous probationary terms. (Book 8, 106: ¶2.)

On Sept. 25, 2008 Petitioner filed a Petition for Writ of Administrative Mandate seeking an order directing the MBC to set aside its decision and reinstate his medical license to unrestricted status in good standing. (*Wayne Chung vs. Medical Board*, San Francisco Superior Court case no. CPF-08-508852). On Oct. 8, 2008, the court issued a stay of decision pending writ proceedings. (Book 8, 131-132.) On Nov. 13, 2008 Judge Patrick Mahoney heard oral arguments. (Book 8, 228-255). On Dec. 18, 2008, Judge Mahoney denied the petition and vacated the stay of decision. (Book 8, 214-218; 220-222; 224-226).

On Jan. 15, 2009, Petitioner filed a Petition for Writ of Mandate and Stay in the California Court of Appeals, First Appellate District. On Jan. 22, 2009, the Petition and Stay were denied by summary order. On Jan. 28, 2009, Petitioner filed a Petition for Review in the California Supreme Court. On March 18, 2009, the Petition was denied by summary order.

REASONS FOR GRANTING THE WRIT

I. The United States Constitution's Guarantee Of Free Expression Has Been Violated

A violation of free speech rights may be established when a governmental response to speech "would chill or silence a person of ordinary firmness from future First Amendment activities." (*Mendocino Environmental Center v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300; see also *Bennett v. Hendrix* (11th Cir. 2005) 423 F.3d 1247, 1254.) "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers" (*Houston v. Hill* (1987) 482 U.S. 451, 461), and retaliation for this criticism is actionable as a civil rights violation under section 1983. (*Greene v. Barber* (6th Cir. 2002) 310 F.3d 889, 895; *Smart v. Board of Trustees of University of Illinois* (7th Cir. 1994) 34 F.3d 432, 434; *Rakovich v. Wade* (7th Cir. 1988) 850 F.2d 1180, 1211; *Elbrader v. Blevins* (D. Kan. 1991) 757 F.Supp. 1174, 1183.) "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right' [citation], and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . ." (*Hartman v. Moore* (2006) 126 S.Ct. at p. 1701).

Petitioner's 2005 complaint letter to the DOJ was an attempt to seek redress for grievances against the government. It is undisputed that writing such a complaint letter is protected speech. (*Cf. Franco v. Kelly*, 854 F.2d 584, 588-89 (2d Cir. 1988)) (describing "right to petition government for redress of grievances" as guaranteed by the First and Fourteenth Amendments"). Such activity is specifically protected from retaliation by the government. For the MBC to utilize Petitioner's complaint letters to the DOJ as the primary basis for disciplinary action against Petitioner is in direct violation of U.S. Const. Amend. Cal. Const. Art and I. I, § 2(a), § 3.

The MBC falsely states, "There simply is not a shred of evidence in the record that Petitioner was disciplined based upon the content of his communications to the

Department of Justice." (Book 8, 175:25-176:2). The Oct. 23, 2007 Petition For Compelling Psych. Exam, the Jan.3, 2008 IOS Petition and the Feb. 10, 2008 Accusation all referred exclusively to Petitioner's DOJ complaint letters as the basis for the MBC's disciplinary action. (Book 8, 10-14; 20-27; 36-42.) Dr. Seaman's entire diagnosis and conclusion rests exclusively on his interpretation of Petitioner's DOJ complaint letters (Book 3, 74-90). The same is true of the Administrative Law Judge Owyang's Proposed Decision (Book 8, 44-65) and the MBC's Decision (Book 8, 87-110). In all actions the MBC refers specifically only to Petitioner's DOJ complaint letters, not to any *actual* examples of patient quality of care issues or unprofessional conduct as required by Bus. & Prof. Code § 822.

Previous courts have upheld speech-based retaliation claims by regulated entities. In *Beechwood Restorative Care Ctr. V. Leeds*, 436 F 3d 147, 151-52 (2d Cir. 2006) the court ruled that federal and state regulators' actions against operators of a nursing home (by revoking its license), due to complaints regarding governmental regulations, constituted retaliation, and was in violation of constitutionally protected free speech rights. In recognizing one's protected interest in commenting on government officials' actions, the courts have stated that "[i]t is clear that '[s]tate action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.'" (*Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citation concealed)). The court held that it was unlawful for the government to deliberately retaliate against a citizen for exercising his right to comment on (and publicly criticize) government officials' actions and his right to access the courts and administrative appeals process for redress of grievances. 874 F.2d at 1314-15 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. V. Doyle*, 429 U.S. 274 (1977)).

In *Soranno's Gasco*, the courts set forth the standard for evaluating whether a regulated entity has established a claim for retaliation based on the exercise of free speech and petition rights. 874 F.2d at 1314-15. A "plaintiff alleging retaliation for the exercise of constitutionally protected rights must initially show that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision." *Id.* At 1314 (citing *Mt. Healthy* 429 U.S. 274, 287). If the plaintiff makes this initial showing, the "burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct.' *Id.* To meet this burden, a defendant must show by preponderance of evidence that it *would* have reached the same decision; it is insufficient to show that it *could* have reached the same decision. *Id.* at 1315. Petitioner's case meets the first criteria, as his DOJ complaint letters were cited repeatedly by the MBC as not only a "substantial" or "motivating" factor, but also the sole factor for its disciplinary decision. The second criteria is also met, as no credible case can be made by the MBC that it *would* have come to the same decision in the absence of Petitioner's DOJ complaint letters. The administrative record is clear that no patient or peer complaints, quality of care issues, or examples of professional misconduct were brought forward during the entire proceedings. (Book 8, 103).

A key question is whether the First Amendment rights violated were "clearly established" at the time of the alleged violations, i.e., '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, (2001) 533 U.S. at 202 (citation and internal quotation marks concealed). The injured party "need not establish that the Defendants' 'behavior had been previously declared unconstitutional.'" *Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir. 2007) (quoting *Blueford v.*

Prunty, 108 F.3d 251, 254 (9th Cir. 1997)). The disparities inquiry is "whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

In Petitioner's case, Ken Gibson of the U.S. DOJ worked in the Criminal section of the Civil Rights Division and clearly should have been aware of First Amendment rights regarding private U.S. citizens' complaints to the government. By purportedly sending an irregular fax on July 7, 2005 to the MBC accusing Petitioner of "severe mental illness" based solely on the complaint letter, he was violating Petitioner's free speech rights; especially since he told Petitioner directly on the phone on July 6, 2007 the complaint letter would be treated confidentially and free from retaliation when asking for a copy of that letter. (Book 5, 191: 4 – 193:3).

Mr. Gibson had the complaint letter in his possession less than 24 hours and was not qualified to make any medical "diagnosis" of Petitioner's mental state. In fact, Brian Lee of the DOJ, sent an official letter dated July 11, 2005 to Petitioner stating it was not in his department's jurisdiction to investigate, and there was *no mention* of mental illness or Mr. Gibson's irregular faxes (Book 3, 181-182). MBC investigator Craig Stewart then proceeded to conduct an unofficial investigation of Petitioner's practice, lasting nearly three years. (Book 2, 2-7); (Book 5, 5: 12 – 16; 21: 4 – 22: 14). Despite the lengthy investigation, Mr. Stewart could not find any professional misconduct or patient quality of care complaints made by anyone against Petitioner. (Book 5, 24: 9 – 14). Despite these lack of findings the MBC decided to proceed with lengthy disciplinary proceedings against Petitioner based solely on the complaint letters in violation of Gov. Code § 12529.6 (b). Significantly, the MBC's investigation report was not approved and signed by Deputy Attorney General Jane Simon (Book 2, 7).

A person deprives another of a Constitutional right, where that person "does an affirmative act, participates in another's affirmative acts or omits to perform an act which [that person] is legally required to do that causes the deprivation of which the complaint is made." (*Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Indeed the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* At 743-44.

Such was the case with Mr. Gibson (U.S. DOJ) taking Petitioner's complaint letters asking for redress of grievances against the government, and using those very letters against him as the basis for retaliation by falsely asserting "severe mental illness". Of course Mr. Gibson must have reasonably known his actions would set off disciplinary proceedings by the MBC which would clearly "inflict constitutional injury" on Petitioner in the form of discipline for his exercise of free speech in writing complaint letters to the DOJ.

There is no evidence that Petitioner's care and treatment of any patient at any time was affected by his attempt to petition the government for redress of grievances through his DOJ complaint letters. The MBC cannot impose discipline on Petitioner's freedom of speech when such expressions have no nexus with his ability to practice medicine safely, U.S. Const. Amend I, Cal. Const. Art. I, § 2(a), § 3. The San Francisco Superior Court erred in not taking into consideration this gross violation of Petitioner's Constitutional free speech right; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

II. The United States Constitution's Guarantee Of Due Process Has Been Violated

A. Lack of Reasonable Cause For Exam Violates The Equal Protection Clause

To be consistent with equal protection, persons similarly situated with respect to the legitimate purpose of a law are entitled to receive like treatment. Petitioner, a healthy licensee, by not being shown reasonable cause for a forced psychiatric exam under Bus. & Prof. Code § 820, was not given the same fairness, and justice in this procedure as other providers had been prior; and therefore was discriminated against and denied equal protection of the laws, U.S. Const. Amend XIV, Cal. Const. Art. I §7. The MBC cites *Alexander D. vs. State Bd. Of Dental Examiners* (1991) 231 Cal. 92, 282 Cal. Rapt. 201 in support of using a provider's own writings to illustrate a state of mind (Book 8, 175:11-20). The petition charged *Alexander* with grossly inappropriate care of two patients. In Petitioner's case, he was not served his Oct. 23, 2007 petition until *after* the IOS hearing and *after* he had been suspended on Feb. 5, 2008.

The guideline set forth in Bus. & Prof. Code § 820 is simply "[w]henever it appears that ... the licentiate's ability to practice is impaired due to mental illness ...." In Petitioner's case, there was no reasonable cause under Bus. & Prof. Code § 820 for his compelled psychiatric exam as there was no reference to patient quality of care issues in his petition as in *Alexander's* case. Petitioner had no prior history of the alleged mental disorder and was not seeing any mental health professional at the time. The MBC used psychiatrist Melvin Brown M.D., (who never examined, treated or met with Petitioner) to submit a declaration based solely on the DOJ complaint letters, in support of the petition (Book 2, 26-29). Bus. & Prof. Code § 820 requires the Medical Board to show a clear nexus to the alleged

mental disorder and Petitioner's ability to practice medicine safely.

Unlike *Alexander*, Petitioner's case has absolutely no nexus. In *Miller vs. Medical Quality Assurance* (1987) 193 Cal. 1371, 238 Cal. Rapt. 915, the court determined it was an unconstitutional violation of the physician's due process rights to compel him to submit to a psychiatric exam without first allowing him a right to a hearing, as required by Bus. & Prof. Code § 2292, the exact situation Petitioner was subject to on Oct. 31, 2007. The court therefore ordered Miller's license reinstated in full, without any conditions. The San Francisco Superior Court erred in not taking into consideration this serious violation of Petitioner's Constitutional equal protection right; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

B. Emergency Suspension Violates Guarantee of Property Rights

Deprivation of Petitioner's right to practice was an "emergency" response out of all proportion to the circumstance of his expressing his right to free speech in writing complaint letters to the DOJ. Under the Due Process Clause, courts have undertaken to protect vested, fundamental rights, particularly the right to practice one's trade or profession from untoward intrusions by government. The MBC may seek an interim suspension order from its Division of Medical Quality (or an administrative law judge) based upon affidavits showing the licensee has engaged in, or is about to engage in, acts violating the Medical Practice Act. (Gov. Code, § 11529, (a).)

There were no such acts or any evidence supporting such future acts in Petitioner's case. Despite no showing that Petitioner posed an *immediate* threat to the public, his

license to practice medicine was emergently suspended without live testimony on Feb. 5, 2008, and continued so indefinitely by the Medical Board's decision effective Sept. 11, 2008, until Petitioner is examined and cleared by a MBC appointed psychiatrist.

For purposes of a due process analysis, there is no meaningful distinction between a license suspension and an order prohibiting a licensee from engaging in the profession for which the person is licensed. (*Gray v. Superior Court, supra,* 125 Cal.App.4th 629, FN 4.) This is in direct violation of Petitioner's constitutionally protected property right to earn a living from his medical license, U.S. Const., Amend. XIV, Cal. Const. Art. I, § 7. The San Francisco Superior Court erred in not taking into consideration this serious violation of Petitioner's Constitutional property right; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

C. Lack of Complete Discovery And Regular Proceedings Violates Guarantee of Due Process

When government agencies adjudicate or make binding decisions that directly affect the legal rights of individuals, those agencies must use procedures traditionally associated with the judicial process. (*Endler v. Schutzbank* (1968) 68 Cal.2d 162, 172, quoting *Greene v. McElroy* (1959) 360 U.S. 474, 507.)

> "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue...[I]t is even more important where the evidence consists of the

> testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy... (Footnote concealed.) (360 U.S. at p. 496 [3 L.Ed.2d at pp. 1390-1391].)

The MBC disregarded this fundamental right to due process by denying Petitioner the right to discover the underlying documents relied upon by the MBC's expert, Charles Seaman, M.D. (Book 1, 115-118; 146-148).

The MBC made misleading assertions that the Jan. 28, 2008 IOS hearing was a "summary suspension proceeding" and not a hearing on the merits, therefore Petitioner was "not permitted to conduct pre-litigation discovery." (Book 8, 176:9-10). Nowhere in Government Code § 11529, does the statute state that an IOS hearing is a "summary suspension proceeding". The APA Bill of Rights mandates that when an agency conducts an "adjudicative proceeding," "the agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." (Gov. Code, § 11425.10(a)(1).)

An "adjudicative proceeding" is defined as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." The hearing on the IOS Petition certainly constitutes an "adjudicative proceeding" in that the Administrative Law Judge made findings of fact (i.e., that Petitioner suffered from a mental condition) and a decision (i.e., an interim suspension order). The rights afforded by the APA Bill of Rights and the federal and California Due Process Clauses are hollow when a respondent physician, such as Petitioner, is prevented from seeing the underlying evidence that supports an expert's opinion. A respondent cannot rebut evidence, which he or she has not seen. Thus, the APA Bill of Rights and the Due Process Clauses serve as the

"authority" for requiring disclosure of the documents reviewed by Dr. Seaman in preparing his Report.

The MBC also misleadingly stated Petitioner's "rights were limited to those delineated in Government Code § 11529(d), i.e. to be represented by counsel, to have a record made of the proceedings and to present written evidence in the form of relevant declarations and documents." (Book 8, 176:12-14). In fact, Petitioner was accorded further additional rights under Government Code § 11529(b), "the licensee shall receive at least 15 days' prior notice of the hearing, which *notice shall include affidavits and all other information in support of the order*." Again, the administrative record shows this was not the case with Petitioner (Book 1, 117-118; 146-148).

1. Falsified Compelling Order

One critical undiscovered document was a May 31, 2007 Compelling Order for Psychiatric Exam which was never served to Petitioner. (Book 1, 93:item 6). We now know it never existed. The MBC states "as shown by the administrative record, no such documents exists" (Book 8, 177:8-9). Yet the MBC misled Administrative Law Judge Crowell by falsely referring to this document at the Jan. 28, 2008 IOS hearing, "in mid-2007 and Dr. Chung declined to be examined, we followed the regular procedure for a petition and an order compelling psychiatric evaluation." (Book 1, 212:16-18). Dr. Seaman also misled Administrative Law Judge Owyang by falsely testifying as to its existence at the full hearing on March 17, 2008, "Well I gleamed that there existed this order." (Book 4, 73:12-16).

A court may also require an expert witness, before testifying in the form of an opinion, to be first examined concerning the basis for that opinion. (Evid. Code, § 802; *Kelly v. Trunk* (1998) 66 Cal.App.4th 519, 523.) Upon objection, a court must exclude an expert's opinion that is

based in whole or in significant part on a matter that is not a proper basis for such an opinion. (Evid. Code, § 803.)

Dr. Seaman falsely referred to this non-existent May 31, 2007 Order Compelling Psychiatric Exam in his own report (Book 3, 75: item 6). By doing so, Dr. Seaman misled Administrative Law Judges Crowell and Owyang, Dr. Dolgoff, Dr. Zaslav and members of MBC Panel A that Petitioner had already been compelled to see another MBC appointed psychiatrist over half a year earlier, a material misrepresentation which surely biased their opinions of Petitioner's mental condition, and influenced their conclusions and decisions. The San Francisco Superior Court erred in not taking into consideration this serious violation of Petitioner's Constitutional due process right; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

2. Concealed 2007 DOJ Faxes

There are 5 concealed faxes (pp.1,2,9,10,11) out of 11 total faxed by Ken Gibson of the DOJ to the MBC on Sept. 5, 2007, that still have not been produced to date in clear violation of Government Code §11507.6. (Book 1, 23-28). These 5 concealed fax pages will likely show what Mr. Gibson stated to the MBC after he received Petitioner's 2007 DOJ complaint letters that resulted in the MBC's urgent Oct. 23, 2007 Petition to Compel Psych. Exam, which was not provided to Petitioner until Feb. 29, 2008 when the investigation report was released (Book 2, 53-57). In *Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798 the court held that it was due process error for the state to deny to a contractor any and all access to factual matters relied upon by the state engineer in deciding the contractor's claim for payment.

The MBC did not provide Administrative Law Judges Crowell or Owyang with these 5 concealed 2007 DOJ faxes. The remaining 6 out of 11 total 2007 DOJ faxes appeared to have been altered when they were submitted to Administrative Law Judge Owyang (Book 3, 62-67), as they did not have the DOJ insignia and time/date on the top, as did the original version in the Jan. 3, 2008 Petition for IOS Hearing. (Book 1, 23-28). As a result, Administrative Law Judges Crowell and Owyang did not have complete, accurate documents to make proper, unbiased decisions. The San Francisco Superior Court erred in not taking into consideration this serious violation of Petitioner's Constitutional due process right; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

3. Irregular 2005 DOJ Faxes

The MBC has repeatedly referred to the U.S. DOJ in their case against Petitioner. Yet there are serious doubts regarding the legitimacy of Ken Gibson's (U.S. DOJ) irregular faxes he purportedly sent to the MBC on July 7, 2005 and July 13, 2005 to initiate the MBC investigation against Petitioner. (Book 2, 9;16). The faxes are from the Special Litigation section, *not* Mr. Gibson's Criminal Section. The DOJ insignia is cut off at the top third. The date/time appears on top of this partial insignia. There is no DOJ abbreviation next to the date/time as was the case with the 2007 faxes. (Book 1, 23-28).

Although administrative bodies are not expected to meticulously observe all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. (*Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349.) "Among these are the following: the evidence must be produced at

the hearing by witnesses personally present, or by authenticated documents . . . [and] cross-examination within reasonable limits must be allowed." (*Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d at p. 455.) In Petitioner's case, Ken Gibson was neither present at any hearing nor submitted any affidavits in support of his irregular 2005 faxes and concealed 2007 faxes.

Neither fax was given to Administrative Law Judge Crowell at the Jan. 28, 2008 IOS hearing. The July 7, 2005 fax appeared to have been altered when submitted to Administrative Law Judge Owyang at the full hearing, as it does not have the time and date on the top (Book 3, 53), as did the original version in Mr. Stewart's investigative report. (Book 2, 9). Again, Administrative Law Judges Crowell and Owyang did not have complete, accurate documents to make proper, unbiased decisions. The San Francisco Superior Court erred in not taking into consideration this serious violation of Petitioner's Constitutional due process right; Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

4. Investigation Report Withheld

MBC investigator Craig Stewart's investigation report contained the factual evidence relied upon by the MBC in deciding to take disciplinary action and initiate IOS proceedings against Petitioner. (Book 2, 2-7). Dr. Seaman relied upon this report in preparing his own evaluation of Petitioner. (Book 2, 98: item 2). Yet this critical report was not released to Petitioner until Feb. 29, 2008, *after* the ISO hearing and *after* he had already been emergently suspended by the MBC. A meaningful opportunity to be heard, and fundamental due process, necessitate that a licensee be provided with all of the

documents that serve as the basis of an expert's affidavit to support suspension of the licensee. In *Shively v. Stewart* (1996) 65 Cal.2d 475, 478-480, the court recognized the right of a licensee to discovery in administrative agency proceedings as a corollary to the agency's investigator powers. No such right was accorded Petitioner.

Significantly, in violation of Gov. Code § 12529.6(b), this report was not approved and signed by Deputy Attorney General Jane Simon (Book 2, 7). As it was never submitted into evidence by the MBC, both Administrative Law Judges Crowell and Owyang did not have this report when making their decisions on Feb. 5, 2008 and April 29, 2008. These irregularities and other due process violations in this case have been detailed further in prior briefs before the MBC. (Book 8, 82-84.)

Petitioner's Constitutional rights are protected from governmental violation under these California state and U.S. federal laws, which give him the right to seek redress: California Civil Code Sec. 52.3(a), and 42 U.S.C. Section 1983. The purpose of Section 1983, according to the United States Supreme Court was to "interpose the federal courts between the states and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Mitchum v. Foster* (1972) 407 U.S. 225, 242. The San Francisco Superior Court erred in not taking into consideration these multiple violations of Petitioner's Constitutional due process rights; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

III. The Medical Board's Decision Is Unconstitutional

The Medical Board's Decision intentionally omitted reference to Dr. Dalgoff's March 10, 2008 declaration where

his conclusion stated unequivocally Petitioner suffered from *no current disorder*. (Book 3, 172.) Instead, the Decision referred to a non-existent Jan. 26, 2008 exam by Dr. Dolgoff, which stated the disorder could not be ruled out. (Book 8, 98: ¶35.) The Decision repeated the findings and conclusions of Administrative Law Judge Owyang, but significantly and without justification *omitted the conclusion that Dr. Chung did not currently present a danger to his patients.* (Book 8, 102: ¶2.) This conclusion was explicitly stated in Administrative Law Judge Owyang's Proposed Decision, but was intentionally edited out by the Medical Board.

The Decision purports to vacate the emergency suspension order, but provides for continuing suspension pending a further psychiatric evaluation and 5 years of probationary conditions. (Book 8, 106: ¶2.) This continued allegation of false mental illness, forced psychiatric evaluation and public disciplinary action using fraud and perjury continues to violate Petitioner's right to freedom of speech, equal protection and due process under The First and Fourteenth Amendment of the United States Constitution and Article I, §1,2,3,7 of the California Constitution.

To protect constitutional free speech "our own citizens must tolerate insulting and even outrageous speech." (*Boos v. Barry* (1988) 108 S. Ct. 1157, 1164.) So, too, the MBC must tolerate Petitioner's complaints to the government. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech." Cal. Const. Art. I, § 2(a). The liberty of speech clause of the California Constitution is more protective of speech and provides even greater protection for expressive activity than the First Amendment. (*L.A. Alliance for Survival v. City of L.A.*(2000) 22 Cal. 4th 352, 354.) Moreover, the use of

government power must comply with First Amendment limits. (*Intel Corp. v. Hamidi,* (2003) 30 Cal. 4th 1342, 1345; *In re Porterfield,* (1946) 28 Cal 2d 91.) Petitioner clearly has a right to petition the government for redress of grievances pursuant to Cal. Const. Art. I, § 3 without fear of retaliation and discipline.

The due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." It was " ' "intended to secure the individual from the arbitrary exercise of the powers of government." ' " (*Daniels v. Williams* (1986) 474 U.S. 327, 331). Petitioner was deprived of a fair proceeding guaranteed by the due process clause contained in the United States and California Constitutions, the Administrative Adjudication Bill of Rights, Government Code §11425.10 et seq., and Code of Civil Procedure §1094.5(b).

The MBC never carried out its obligation to truly investigate the circumstances underlying Petitioner's complaint letters and simply assumed that all of the allegations were untrue. To be consistent with equal protection, persons similarly situated with respect to the legitimate purpose of a law are entitled to receive like treatment. Petitioner, a healthy licensee, by not being shown reasonable cause for a forced psychiatric exam under Bus. & Prof. Code § 820, was not given the same fairness, and justice in this procedure as other providers had been prior; and therefore was discriminated against and denied equal protection of the laws, U.S. Const. Amend XIV, Cal. Const. Art. I §7.

Deprivation of Petitioner's right to practice was an "emergency" response out of all proportion to the circumstance of his expressing his right to free speech in writing complaint letters to the DOJ. Under the Due Process Clause, courts have undertaken to protect vested, fundamental rights, particularly the right to practice one's

trade or profession from untoward intrusions by government. The MBC cannot discipline Petitioner on the basis of his exercise of protected free speech, without establishing the nexus to impaired ability to practice safely. The MBC did not produce one *actual* example of any lessening or diminishing of Petitioner's competency to practice safely, yet decided to discipline him, nevertheless; in effect retaliating against and silencing any further attempts to exercise his right to free speech as guaranteed by the United States and California Constitutions.

The right to criticize the government and governmental officials is among the quintessential rights Americans enjoy under the First Amendment of the United States Constitution, and Californians enjoy under the California Constitution, article I, § 2. The general public's interest is greatly served by an examination of whether the MBC, as a state governmental agency, can set a chilling precedence for silencing of protected free speech not only by the Petitioner, but also of other license holders and the general public as well.

To repeat, if the Medical Board's decision is left to stand, any U.S citizen can be retaliated against for writing complaint letters to the government, by simply having the very complaint letters used against him or her as the basis for a false accusation of mental illness, and subsequent licensure discipline in order to silence the complaint. Such precedence should not be allowed to take place in this day and age in the United States of America. To this date, Petitioner has continued to be prevented from practicing medicine by the MBC, in violation of his Constitutionally protected property right. The San Francisco Superior Court erred in not taking into consideration these multiple violations of Petitioner's Constitutional rights; therefore Petitioner respectfully requests the Court grant review of his Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari.

Dated: May 11, 2009

Respectfully submitted,

By: _____
WAYNE CHUNG, MD

Petitioner

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APPENDIX A

IN THE SUPERIOR COURT
IN AND FOR THE COUNTY OF SAN FRANCISCO

WAYNE CHUNG, MD
Petitioner.

vs.

MEDICAL BOARD OF CALIFORNIA
Respondent.

FILED
San Francisco County Superior Court
Dec. 19, 2008
Gordon Park-Li, Clerk
By: s:/ Marjorie Schwartz-Smith
Deputy Clerk

Case No: CPF-08-508853

ORDER ON PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

Date: November 12, 2008
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Patrick J. Mahoney

The Petition for writ of administrative mandamus filed by Wayne Chung, MD, came on regularly for hearing in Department 302 of San Francisco Superior Court, the Honorable Patrick Mahoney, Judge presiding. Petitioner was represented by John L. Fleer, Esq., and respondent was represented by Attorney General Edmund G. Brown Jr., by Deputy Attorney General Lawrence Mercer. The Court, having considered the petition an answer, the memoranda of points and authorities and the administrative record, as well as the argument of counsel, and good cause appearing therefore,

The Court ORDERS, ADJUDGES AND DECREES that:

1. The Petition for Administrative Writ is DENIED.
2. The stay order previously entered in this matter is VACATED.
3. The Clerk of the Court shall enter judgment against petitioner and in favor of respondent.

Exercising its independent judgment and based solely on admissible evidence, the Court makes the following findings and said findings shall constitute its statement of decision:

1. Petitioner's due process rights were not violated when he was directed to submit to a mental examination. *Alexander D. v. State Board of Dental Examiners* (1991) 231 Cal.App.3d 92; Business and Professions Code § 820.

2. Petitioner is not deemed disciplined for engaging in free speech. It was appropriate for respondent and the expert witness to consider the content of the petitioner's letters to the government as evidence of his mental health.

3. The decision of the respondent is supported by clear and convincing competent evidence and is entitled to a presumption that it is correct. Code of Civil Procedure 1094.5.

4. One of the examining physicians found petitioner to be suffering from an active delusional state and that he remained psychotic. Another expert disagreed and a third expert agreed that there were delusional episodes in 2005 and that petitioner's condition had improved. All three experts agreed that psychotherapy would be beneficial for petitioner.

5. The evidence supports a finding to impose discipline pursuant to Business and Professions Code § 822.

6. Respondent need not wait until a patient has been harmed. On this record, respondent may protect the public from the risk of harm. *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757.

7. Finally, respondent imposed reasonable conditions of probation given the conflicting testimony as to whether petitioner is currently impaired. The conditions are designed to provide help to the petitioner and to protect the public.

Dated: December 18, 2008 s/: **Patrick J. Mahoney**

Patrick J. Mahoney
Judge of the Superior Court

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

WAYNE CHUNG

Petitioner.

v.

The Superior Court of the City

and County of San Francisco,

Respondent

THE MEDICAL BOARD OF CALIFORNIA

Real Party in Interest

A123766 (San Francisco County
Super. Ct. No. CPF 08-508852)

Court of Appeal, First Apellate District
FILED Jan. 22, 2009
By Diana Herbert, Clerk Deputy Clerk

THE COURT:
The request for a stay is denied.
The petition for writ of mandate is denied.
(Ruvolo, P.J., and Reardon, J., joined in the decision.)

Date: Jane. 22, 2009 **RUVOLO, P.J.** P.J.

APPENDIX C

Court of Appeal, First Appellate District,
Div. 4-No. A123766

S170087

IN THE SUPREME COURT OF CALIFORNIA

En banc

WAYNE CHUNG

Petitioner.

v.

The Superior Court of the City

and County of San Francisco,

Respondent

THE MEDICAL BOARD OF CALIFORNIA

Real Party in Interest

Supreme Court FILED March 18, 2009
Frederick K. Ohlrich Clerk
Deputy

The petition for review is denied.

GEORGE
Chief Justice